MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, A.D. 1974

No. 74-798

THE LITTLESTONE COMPANY, an Illinois corporation, JULIUS OSTROM and ESTELLE H. OSTROM, his wife,

Petitioners,

vs.

THE COUNTY OF COOK, a body politic and corporate, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District, Fifth Division

BRIEF FOR RESPONDENTS IN OPPOSITION

BERNARD CAREY
State's Attorney of Cook County
By JEROME S. SCHAIN
500 Chicago Civic Center
Chicago, Illinois 60602
Attorney for Respondent,
County of Cook

ZACHARY D. FORD
1740 Waukegan Road
Glenview, Illinois 60025
Attorney for Respondent,
Village of Glenview

FREDERIC O. FLOBERG
Suite 3100
One IBM Plaza
Chicago, Illinois 60611
Attorney for Respondent,
Village of Northbrook

EDWARD F. RYAN
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-2988

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OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District, Fifth Division (App. A of Petition) is reported at 19 Ill. App. 3d 222, 311 N.E. 2d 268. The order of the Illinois Supreme Court denying leave to appeal was entered on September 27, 1974; notice of said denial was sent to all counsel of record on September 27, 1974 (App. B of Petition).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Cook County Zoning Ordinance, as it applies to the subject property, bears a reasonable relationship to the health, safety or welfare of the community.

2. Whether the petitioners sustained their burden of overcoming the presumptive validity of the Cook County Zoning Ordinance by clear and convincing evidence.

CONSTITUTIONAL AMENDMENTS AND COUNTY ORDINANCES INVOLVED

The Constitutional Amendments alleged to be violated, and certain sections of the Cook County Zoning Ordinance allegedly involved, are set forth at pages 2 and 3 of the Petition and at Appendix C to the Petition.

STATEMENT OF THE CASE

This litigation concerns an application for the rezoning of certain property in the unincorporated area of Cook County in Northfield Township, Illinois. The petitioners Julius Ostrom and Estelle H. Ostrom are the owners of the subject property. The petitioner, The Littlestone Company, is the contract purchaser and proposed developer of the subject property.

The respondents are the County of Cook, a body politic and corporate, surrounding property owners, George W. Drymalski and Cecil J. Drymalski, and two municipalities. The municipalities are the Village of Northbrook, which is contiguous to the subject property, and the Village of Glenview, which is in proximity to the subject property.

The Littlestone Company agreed to acquire the subject property from Julius Ostrom and Estelle H. Ostrom in 1969. The Littlestone Company's obligation to purchase the property is subject to a successful application for rezoning. The purchase price for the property is $220,000. Julius Ostrom and Estelle H. Ostrom had purchased the property in February, 1959 from George W. Drymalski and Cecil J. Drymalski, for $59,000.

The subject property is a tract of land, containing 17.95 acres, which is vacant, except for the residence building in which Julius Ostrom and Estelle H. Ostrom live. It is an irregular tract of land which is roughly L-shaped. The

subject property is presently classified in the R-3 Single Family Zoning District of Cook County in which the minimum lot size is 20,000 square feet.

The subject property lies along the north side of Willow Road and the west side of Landwehr Road, just east of the Tri-State Tollway. There is one vacant tract of land, approximately 38 acres, on the west side of the subject property, which separates the subject property from the Tri-State Tollway. Except for the tollway on the west, the subject property is entirely surrounded by property that is zoned for, and in many cases developed with, single family dwellings. In fact, the petitioners' own land planning expert stated at trial that in the area most significantly related to the subject property there are only single family residences.

The petitioners' land planning expert further stated at trial that east of the tollway, going north, the nearest non-residential zoning or use is a mile and a half from the subject property. He further testified that, going south, the closest non-residential use would be two to three miles to the south of the subject property, and that, therefore, in a straight line from the north to the south from the subject property for about four and a half miles, there is nothing but single family residences or vacant property zoned for single family uses.

To the north of the subject property is the Drymalski property, which consists of 11 acres zoned and used for single family purposes. To the northwest is a single family community known as Citation Lake Estates which has been in the process of continuous development for the past 8 or 9 years. To the immediate north of and touching the subject property is the Landwehr Estates development

which is a single family residential development of half acre lots. To the east of the subject property are a number of other single family developments, including the Stonehedge Subdivision located west of Pfingsten Road on Willow. To the south of the subject property are the Willows East and Willows West single family developments. In addition, there are various single family homes directly east of the subject property on Landwehr Road and directly south on Willow Road.

Directly west of the subject property, dividing the subject property from the Tri-State Tollway are 38 acres which are zoned for single family uses.

The uses west of the tollway are typified by large sites and office development. The trend of commercial development is in a relatively isolated area confined on the west by forest preserve property and on the east by the tollway. Within that area between a quarter and a half mile west of the tollway there are 400 acres which can be developed with commercial and office establishments.

The petitioners desire to construct three five-story office buildings containing a gross area of approximately 240,000 square feet. There would also be a six-story 201 room hotel-motel, parking for approximately 1400 automobiles, and a lake of slightly less than two acres. The office buildings would be 62 feet high; the motel would be approximately 59 feet high.

The petitioners, The Littlestone Company, Julius Ostrom and Estelle H. Ostrom had requested the Board of Commissioners of Cook County to reclassify the subject property from the R-3 Single Family Residence District to the B-4 General Service District, with a Special Use for a Planned Development. The Board of Commissioners of

Cook County, upon consideration of the recommendation of the Cook County Zoning Board of Appeals, denied the petitioners' request.

The petitioners then filed an action against the County of Cook in the Circuit Court of Cook County, Illinois to declare that the R-3 single family zoning of the property, title to which was held by Julius Ostrom and Estelle H. Ostrom, was invalid and unconstitutional, to declare that the petitioners had a right to use their property for a commercial planned development under the B-4 General Service District, consisting of three office buildings, a motel, a swimming pool and restaurant facilities, and to restrain the County and its officials from interfering with that use. The Villages of Northbrook and Glenview, Allstate Insurance Company, Paul Walsh, Benjamin Harris, George W. Drymalski and Cecil J. Drymalski were granted leave to intervene as intervenor-defendants in opposition to the petitioners' complaint. After a trial on the merits, at which both sides presented extensive land planning, real estate valuation and traffic testimony, judgment was entered for the petitioners and against the respondents. (App. F of Petition)

The County and the Intervenors, Village of Northbrook, Village of Glenview, and George W. Drymalski and Cecil J. Drymalski, appealed that judgment to the Appellate Court of Illinois. The Illinois Appellate Court, in reversing the judgment of the Circuit Court of Cook County on April 11, 1974 (App. A of Petition, A21), correctly summarized this traditional zoning case by stating:

> "We have carefully reviewed the record in the instant case and find that at best there is created a legitimate difference of opinion on the reasonableness of prohibiting the proposed use. Under such circum-

> stances the presumption of validity has not been overcome. In view of this finding we need not consider defendants' other contention. Shaping the order of the court to the facts of the particular case, we hold that prohibiting plaintiffs' proposed development is reasonably related to the public health, safety, morals and welfare of the community. The judgment is reversed." (Citations omitted)

The petitioners filed a petition with the Supreme Court of Illinois requesting leave to appeal the judgment of the Appellate Court of Illinois. The Supreme Court of Illinois denied the petition for leave to appeal (App. B of Petition).

ARGUMENT

I.

THERE IS NO CONFLICT OF DECISION AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The decision of the Appellate Court of Illinois herein (App. A of Petition) does not conflict with this Court's holdings in any of the cases cited in the Petition. These cited cases, in fact, support the respondents' position that the legislative judgment of the County of Cook is presumptively valid, and that the petitioners have not overcome this presumptive validity by clear and convincing evidence. In addition, the cases cited in the Petition demonstrate beyond a doubt that the Petition should be denied for want of an important federal question.

In the landmark case of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, cited by petitioners, this Court held with the broad view taken by the substantial majority of state court rulings available at the time and declared constitutional the comprehensive zoning ordinance of the City of Euclid and upheld the right of the City of Euclid to zone as residential a long strip of land along a railroad right of way that had been purchased with a view to industrial development. The Court in this noted opinion sustained the view taken by many state courts of last resort, including the State of Illinois, that the exclusion of commercial development from residential districts bears a rational relation to the health, safety and welfare of the community. The Court cited, with approval, pertinent language from *City of Aurora* v. *Burns*, 319 Ill. 84, 93-95, 149

N.E. 784, 788, which had sustained a comprehensive zoning ordinance of the City of Aurora. The Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 acknowledged the presumptive validity of zoning regulations by stating:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

A long line of Illinois Supreme Court and Appellate Court decisions both prior to and following the *Euclid* case have continued to uphold zoning ordinances as legitimate exercises of state police power and have continued to acknowledge their presumptive validity.

In *Nectow* v. *Cambridge*, 277 U.S. 183, cited by the petitioners, the ordinance involved had zoned only a strip of the subject parcel of land as residential property, and left the remainder of the property unrestricted. In addition, the strip of land was apparently the only parcel in the entire block, which was zoned as residential property. This Court, in holding that zoning ordinance unconstitutional as it applied to that parcel of property, commented that it does not ordinarily substitute its judgment for that of the "zoning authorities primarily charged with the duty and responsibility of determining the question." (277 U.S. at 188) In the instant case the character of the area surrounding the subject property is predominantly residential, and the entire parcel of property was zoned residential before the petitioners purchased the property.

In the interim since the *Euclid* and *Nectow* cases were decided, this Court has chosen to leave the resolution of zoning issues to the state courts, unless obvious cases of racial discrimination, or other arbitrary and abusive exercises of zoning power, are present.

In *Buchanan* v. *Warley,* 245 U.S. 60, also cited by petitioners, the Court invalidated a city ordinance which prevented a Negro from acquiring real property in a white residential area. The Court based its decision on "the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." (245 U.S. at 82) That zoning ordinance had specifically prohibited occupation of housing by "persons of color." The decision in *Buchanan* v. *Warley, supra,* is obviously not applicable to any issues raised by the Petition.

In *Seattle Trust Co.* v. *Roberge,* 278 U.S. 116, cited by petitioners, a Seattle zoning ordinance was at issue which permitted a "philanthropic home for children or for old people" in a district only "when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." (278 U.S. at 118) The Court held that provision of the zoning ordinance unconstitutional because the existing owners were free "to withhold consent for selfish reasons or arbitrarily" and because such delegation of power so attempted is "repugnant to the due process clause of the Fourteenth Amendment." (278 U.S. at 122) No such comparable delegation of power is in any way involved in the instant case, and *Seattle Trust Co.* v. *Roberge, supra,* is wholly inapplicable to the issues before this Court.

In the instant case the County of Cook had denied the petitioners' application to rezone the subject property to permit the petitioners to use their 17.95 acre tract of land for three five-story office buildings and a six story motel, with a swimming pool, a restaurant and parking facilities for 1400 automobiles. At trial respondents herein intro-

duced the testimony of two land planners, a traffic expert, a real estate expert and a neighboring property owner, all tending to demonstrate that the petitioners had failed to overcome the presumption of validity attaching to the Cook County Zoning Ordinance. The trial court, however, declared the Cook County Zoning Ordinance void as it applied to the subject property, and the Illinois Appellate Court then followed a long line of well reasoned Illinois Authority in reversing the judgment of the trial court and in sustaining the validity of the zoning ordinance, and in effect, the judgment of the legislative body. See e.g., *Liberty National Bank* v. *City of Chicago*, 10 Ill. 2d 137, 139 N.E. 2d 235; *Schultz* v. *Village of Lisle*, 53 Ill. 2d 39, 289 N.E. 2d 614. The Supreme Court of Illinois, apparently impressed by the same body of precedent, denied the petitioners' application for leave to appeal.

The opinion of the Illinois Appellate Court does not conflict with, and in fact, follows, prior decisions of this Court. The Petition merely raises issues of state law which have already been litigated and decided by the Illinois Appellate Court and the Supreme Court of Illinois. The Petition's unsubstantiated arguments cannot convert a correct decision in a simple case into an important question of federal law, and the Petition should therefore be denied.

II.

THE DECISION BELOW IS CLEARLY CORRECT

The instant case involves a rather typical zoning matter in which, in the first instance, the Cook County Board of Commissioners was faced with the petitioners' application for a zoning change to permit an excessively intense commercial use of the subject property in an area already

characterized by residential development. The County Board, upon the recommendation of the Cook County Zoning Board of Appeals, denied petitioners' application to put three five-story office buildings, a six story 201 room hotel-motel and parking area for 1400 cars on the subject property. The petitioners then filed this lawsuit in the Circuit Court of Cook County, and the trial court incorrectly determined that the petitioners had met their burden of proof in setting aside the single family zoning restriction on the property, and in permitting the proposed commercial use.

The Appellate Court, however, reversed the judgment of the trial court. Its decision is clearly correct in light of established Illinois precedents and is consistent with the principles of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, and its progeny. The Illinois Supreme Court, relying on the same line of precedent, denied the petition for leave to appeal.

The Appellate Court of Illinois spent several pages of its opinion in reviewing the testimony of each expert witness called by the petitioners and respondents. (App. A of Petition, A5-A12) Moreover, the Appellate Court considered each of the traditional criteria established by the Supreme Court of Illinois in determining the validity of the zoning ordinance in question, including various criteria not contested by petitioners, and did not, as petitioners suggest, dwell on any one factor more than any other. (App. A of Petition, A16-A21).

The Appellate Court, after a review of all the evidence, in light of established zoning criteria, found that the extensive expert testimony on both sides, involving real estate valuation, traffic and land planning issues, created a legit-

imate difference of opinion regarding the reasonableness of the disputed zoning classification. On that basis the Appellate Court concluded that petitioners had failed to prove that the existing zoning is unreasonable *and* that the proposed use is reasonable, as applied to the subject property, and that the presumption of validity attaching to the Cook County Zoning Ordinance had therefore not been overcome by clear and convincing evidence.

Again and again the Supreme Court of Illinois, in keeping with the dictates of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, has emphasized that when a legitimate dispute exists as to the reasonableness of the zoning classification of a parcel of land, when the restriction is fairly debatable, then the judgment of the corporate authorities of the municipality must prevail. *Trendel* v. *Cook County*, 27 Ill. 2d 155, 161, 188 N.E. 2d 668, 672; *Exchange National Bank* v. *Cook County*, 25 Ill. 2d 434, 440, 185 N.E. 2d 250, 253. The language used in the *Exchange National* decision is typical:

> "Where it appears, from all of the facts, that room exists for a difference of opinion concerning the reasonableness of a classification, the legislative judgment must be conclusive." (25 Ill. 2d at 440).

Contrary to the contentions of the petitioners, the decision in *Hutson* v. *Cook County*, 17 Ill. App. 3d 195, 308 N.E. 2d 65 is also not controlling here. The question of whether the plaintiffs in this case have overcome the presumption of validity attaching to the Cook County Zoning Ordinance by clear and convincing evidence involves facts unique to this case. The proposed development in the *Hutson* case, as the Appellate Court recognized, is entirely different from the proposal in the instant case. Even if there exists a similarity of location or parties, it is obvious that each zoning case is decided on its own facts and cir-

cumstances and that one zoning case can never absolutely control the outcome of another zoning case. *Galt* v. *County of Cook*, 405 Ill. 396, 403, 91 N.E. 2d 395, 399. There were, however, substantial distinctions between the factual settings faced by the trial courts in the *Hutson* case and in the instant case, many of which were delienated in the Appellate Court's opinion (App. A of Petition, A20-A21).

Without any reference to the trial record, petitioners have further attempted to create the false impression that to sustain the subject zoning ordinance would result in a curtailment of economic development in the area surrounding the subject property. Nothing could be further from the truth. First, this is exactly the kind of zoning protection which permits *orderly* and *continued* growth in an area. Second, it is clear from the facts brought forth at trial, including the testimony of one of petitioners' own experts, that there has been considerable single family residential development over the last ten years in the area, and that this trend of development continues to the present.

Petitioners have also argued, without any support in the record, that respondents' expert witnesses agreed that the present R-3 zoning was unreasonable. This is not correct. Respondents' real estate expert in fact testified that the R-3 zoning was reasonable and that the subject property could be developed under R-3 zoning.

In summary, the instant litigation dealt with an attempted rezoning of land for a commercial development that would be totally out of harmony with the character of the neighborhood in which it was to be located, the one factor that Illinois courts have said time after time is the paramount consideration in determining the validity of a zoning decision. The petitioners propose to construct three

five-story office buildings, consisting of approximately 240,000 square feet, a six-story 201 room motel, and a parking area for 1400 cars in the midst of an area that is uniformly zoned and used for single family homes.

The petitioners' evidence, however, never answered the question of what conceivable public interest would be served by this massive concentration of commercial activity in an essentially single family area. In such circumstances the decision of the Illinois Appellate Court was clearly correct and should be permitted to stand.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD CAREY
State's Attorney of Cook County
By JEROME S. SCHAIN
500 Chicago Civic Center
Chicago, Illinois 60602
Attorney for Respondent,
County of Cook

ZACHARY D. FORD
1740 Waukegan Road
Glenview, Illinois 60025
Attorney for Respondent,
Village of Glenview

FREDERIC O. FLOBERG
Suite 3100
One IBM Plaza
Chicago, Illinois 60611
Attorney for Respondent,
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EDWARD F. RYAN
Of Counsel